SUPREME COURT, U.S.
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No. 15-415

In the
Supreme Court of the United States

ENCINO MOTORCARS, LLC,

Petitioner,

v.

HECTOR NAVARRO; MIKE SHIRINIAN; ANTHONY PINKINS; KEVIN MALONE; AND REUBEN CASTRO,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

The Fair Labor Standards Act (FLSA) exempts from its overtime-pay requirements "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles." 29 U.S.C. §213(b)(10)(A). As Respondents acknowledge, Congress "limited the exemption to only three enumerated types of dealership employees ('salesman, partsman, or mechanic') primarily engaged in two particular activities ('selling or servicing') on three types of machinery ('automobiles, trucks, or farm implements')." Resp.Br.13. Because service advisors are "salesm[e]n" primarily engaged in "servicing" of "automobiles," they are plainly exempt. Indeed, they are undeniably salesmen and are engaged in nothing but selling and servicing automobiles. That unambiguous interpretation is confirmed by basic rules of grammar, decades of precedent, the FLSA's underlying purposes, and a practical understanding of service advisors' roles.

Respondents nonetheless jump through hoops in an attempt to show that the statute means something different from what it literally says. First, Respondents assert that salesmen are exempt only if they are "engaged in selling ... automobiles," but not if they are "engaged in ... servicing" them. But the statute exempts "*any* salesman ... engaged in selling *or servicing* automobiles." The words "any" and "or" underscore the exemption's breadth. Respondents dust off an antiquated canon of construction and invoke a laundry list of inapposite statutes to resist this plain-language and common-sense interpretation, but none of that changes the reality that there are tens

of thousands of service advisors actively engaged in servicing automobiles who fall comfortably within the exemption's plain language.

Respondents attempt to resist that conclusion by invoking a series of ad hoc definitions of "servicing," including (among others) a "grease-under-the-nails" test, a "no tie" requirement, and a "work-in-the-back" rule. But those narrowing definitions have no grounding in the statute (or even DOL's regulatory interpretation), and all but the least plausible and most gerrymandered would impermissibly write out of the statute not only service advisors but also partsmen. At the end of the day, the only way to make sense of Congress' inclusion of partsmen is to construe "engaged in ... servicing" as encompassing both salesmen and partsmen who are engaged in the servicing process, without regard to whether they do so personally or get their hands dirty, which not coincidentally is precisely what the statutory text provides.

Finally, Respondents' and DOL's pleas for deference should be rejected. Even if the statutory language were ambiguous, DOL's unexplained return to non-acquiescence would upset decades of long-settled reliance interests through a rule that retroactively imposes massive liability on dealerships while doing nothing to advance the FLSA's purposes. The possibility that service advisors could qualify for other, more general exemptions hardly justifies a narrow and atextual interpretation of the *specific* exemption for dealership employees in §213(b)(10)(A). To the contrary, the fact that Respondents are the kind of employees *generally* exempted from the FLSA

is precisely why Congress included them in the *specific* provision addressed to three kinds of employees engaged in either of two kinds of activities involving any of three kinds of vehicles. The decision below should be reversed.

I. Service Advisors Are Unambiguously Exempt Under §213(b)(10)(A).

A. The Statute Exempts All Salesmen "Primarily Engaged in Selling *or Servicing* Automobiles."

1. Section 213(b)(10)(A) unambiguously exempts "any salesman ... primarily engaged in selling *or servicing* automobiles." To the extent that salesmen primarily engaged in servicing automobiles exist—and there are 45,000 of them—they are literally covered by the exemption. Basic rules of grammar reinforce that literal reading by dictating that each element in a disjunctive list be given meaning when it is sensible to do so. Pet.Br.24-25. The phrase "engaged in selling or servicing" is disjunctive, and both gerunds—"selling" and "servicing"—can sensibly be applied to the noun "salesman." There is nothing anomalous about either automobile salesmen or service advisors. Both exist in large numbers. Service advisors are thus exempt under a straightforward application of the statutory text. And that interpretation is further confirmed by Congress' use of the word "*any*" before "salesman," which suggests an "expansive meaning," *United States v. Gonzales*, 520 U.S. 1, 5 (1997).

Given the clarity of the statutory text, it is unsurprising that every court to consider this issue (until the Ninth Circuit in the decision below)

concluded that service advisors were exempt. Pet.Br.27-28. Those decisions rejected DOL's interpretation as unreasonable because it is an "impermissibly restrictive construction" that is "flatly contrary to the statutory text." *Walton v. Greenbrier Ford*, 370 F.3d 446, 451-52 (4th Cir. 2004). For three decades, DOL acquiesced in those decisions and the clear result provided by the statutory text.

2. Respondents nonetheless insist that salesmen are exempt *only* if they are engaged in selling automobiles, not if they are engaged in servicing them. That is, Respondents assert that salesman goes only with selling, while partsman and mechanic go only with servicing. Resp.Br.10. In implicit recognition that the literal language of the statute covers salesmen primarily engaged in servicing, Respondents invoke the canon of construction "*reddendo singula singulis*," which translates to "referring each to each." Respondents summarize the canon as "[f]irst often goes with first, as last often goes with last." Resp.Br.24. They present a laundry list of other statutes that purportedly illustrate the canon. Resp.Br.21-24; Resp.App.D21-D35.

But the statutes that follow the *reddendo* canon have a critical thing in common, implicit in the very name of the canon, that §213(b)(10)(A) lacks: They all have the *same number* of nouns and verbs, such that *each* noun corresponds to *each* verb. Even when a statute has the same number of nouns and verbs, the *reddendo* canon is not a strong one, and context determines whether the gerunds modify multiple nouns or just one. Pet.Br.32-33 (eating/drinking dogs/cats versus barking/meowing dogs/cats). Section

213(b)(10)(A), however, contains three nouns and just two gerunds, thus defeating the precondition for the canon. Indeed, it is telling that when applying *reddendo* to §213(b)(10)(A), Respondents must invent a modified canon that highlights the poor fit. Respondents assert that "the first noun pairs with the first verb and the last *noun(s)* with the last *verb(s)*." Resp.Br.10 (emphasis added). The additional "(s)" that Respondents need to add to each reference is their own innovation and underscores the oddity of applying *reddendo* to a statute with more nouns than verbs.

To the contrary, the mismatch between nouns and verbs is a powerful indicator that the distributive principle suggested by the plain text is fully applicable. To illustrate this point, one need look no further than Respondents' 53 examples of disjunctive statutes containing different numbers of nouns and verbs. Those examples reaffirm the common-sense default grammatical rule that all nouns pair with all verbs as long as the combination describes an extant entity or is otherwise sensible. For example, 43 U.S.C. §952 permits "[a]ny person, livestock company, or transportation corporation engaged in breeding, grazing, driving, or transporting livestock" to construct reservoirs. In that provision, "breeding" and "grazing" can apply to both "person" and "livestock company," while "driving" and "transporting" can apply to all three nouns. "Grazing" and "breeding" do not apply to "transportation corporation," because "transportation corporation[s]" do not commonly engage in breeding or grazing. That imperfect distribution of nouns and verbs is not the product of *reddendo* (which is inapplicable and unhelpful in matching three nouns with four verbs), but rather the

normal default rule that each noun applies to each verb *whenever it can do so sensibly*.

Respondents concede that the default grammatical rule, and not *reddendo*, applies in nearly all of the 53 statutes they identify containing two disjunctive lists of unequal numbers. Respondents highlight (quite literally) this concession in their Appendix D by using different notations (*e.g.*, underlining, bolding) to illustrate when particular nouns pair with particular verbs (*e.g.*, underlining both the noun and verb when they pair). Thus, the telltale sign in Appendix D that a statute conforms to the default grammatical rule, and not *reddendo*, is when a word is modified in two (or more) ways (*e.g.*, underlined *and* italicized). In those instances, nouns pair with more than one verb (or vice versa), so that each sensible noun-verb combination has meaning. *See* Resp.App.D2-D20.

Respondents attempt to demonstrate the applicability of *reddendo* to two disjunctive lists of unequal numbers by offering the contrived sentence: "When my cats, dogs, or seals are meowing or barking, I feed them." Resp.Br.25. There are, of course, no barking cats or meowing dogs or seals, so *reddendo* is not needed to exclude them. If anything, this sentence merely illustrates that disjunctive nouns pair with disjunctive verbs *when sensible*. In Respondents' contrived "cat-dog-seal" sentence, the problem is not that the nouns do not distribute to every verb, but that some noun-verb combinations are not sensible or constitute a null set. If the word "listless" were substituted for "barking," there is little question that a listless cat would be fed. Indeed, even in

Respondents' stylized sentence, it seems likely that a newly-discovered meowing seal would not go hungry.

3. Respondents and DOL rely heavily on *United States v. Simms*, 5 U.S. (1 Cranch) 252 (1803), as an example of this Court's invocation of *reddendo*, *see* Resp.Br.21-22; U.S.Br.18-19, but that reliance is badly misplaced.

It is no accident that Respondents need to reach back so far to find an example, as the canon has largely fallen into disuse. The canon last appeared in any Supreme Court decision in a 1918 *dissent*, *Sandberg v. McDonald*, 248 U.S. 185, 204 (1918) (McKenna, J., dissenting), was last mentioned in a majority opinion in 1896, *Atlantic & Pacific R.R. v. Laird*, 164 U.S. 393, 400 (1896), and did not feature in the decisions below.

Simms is readily distinguishable. The statute there provided that "penalties ... accruing *under the laws of ... Maryland and Virginia*, ... shall be recovered..., *by indictment or information*..., or *by action of debt*...." *Simms*, 5 U.S. at 254 (emphasis added). In that case, the United States sought recovery under Virginia law by indictment. The problem was that Virginia law did not authorize recovery by indictment, but instead by "action of debt." *Id.* at 256. Thus, under Virginia law, recovery by indictment was the functional equivalent of a barking cat. There was no such thing. This Court understandably concluded that Congress did not create a new remedy under Virginia law, especially in light of a related statute that required the United States to maintain Virginia law. *Id.* at 257-59.

Simms illustrates what happens when a particular combination of words produces a null set. In that situation, the basic rule of grammar does not require the *creation* of a new combination where none previously existed. But where combinations are sensible, the basic grammatical rule and literal reading still prevail. If Virginia law *had* permitted recovery by indictment, or Maryland had permitted recovery by indictment, information, and action for debt, all the extant actions could proceed.

The same principle holds for §213(b)(10)(A). Respondents and DOL suggest that the phrase "engaged in ... *servicing* automobiles" does not apply to *salesmen* because there are no *mechanics* who are "primarily engaged in *selling*" automobiles. Resp.Br.26-27; U.S.Br.20. But that is a non sequitur. Mechanics primarily engaged in selling automobiles are not covered by the exemption because they do not exist, not because they are excluded by some grammatical principle. The problem for Respondents is that while there are no mechanics primarily engaged in selling automobiles, there *are* salesmen primarily engaged in servicing automobiles—service advisors. Indeed, there are 45,000 more salesmen primarily engaged in servicing automobiles than there are mechanics primarily engaged in selling automobiles. The non-existence of the latter is no reason to deny exempt status to tens of thousands of flesh-and-blood examples of the former.

4. Respondents also invoke multiple grammar guides, but none supports their strained interpretation. Resp.Br.20-23, 26. For example, Scalia and Garner *disapprove* of *reddendo* as the

byproduct of an earlier era of inartful drafting. *See* Antonin Scalia & Bryan Garner, *Reading Law* 215-16 (2012). Respondents suggest that, because grammar guides disapprove of unnecessary use of the word "respectively," *reddendo* must generally apply because the word "respectively" would otherwise be needed to convey a one-to-one pairing. Resp.Br.26. But Respondents fail to mention *why* grammarians disapprove of "respectively." Using "respectively" is disfavored because there are straightforward ways to achieve the same meaning—specifically, by attaching each gerund to only the noun it modifies. *See* William Strunk & E.B. White, *Elements of Style* 51 (2d ed. 1972). More tellingly, Fowler notes that using "respectively" is "unintelligible" in sentences with *unequal* numbers of nouns and direct objects, underscoring the absurdity of applying *reddendo* (Respondents' suggested substitute for "respectively") in such contexts. H.W Fowler, *Dictionary of Modern English Usage* 522 (2d ed. 1965).

The lesson from these grammar guides is that Congress could have easily written §213(b)(10)(A) to exempt "any salesman primarily engaged in selling, or any partsman or mechanic primarily engaged in servicing, automobiles." But Congress did not express itself that way because it plainly intended for the gerunds "selling" and "servicing" to distribute to each noun that could be sensibly linked to those gerunds.

B. Service Advisors Are Unambiguously "Engaged in ... Servicing Automobiles."

It is undisputed that Respondents are salesmen.[1] They are also "engaged in ... servicing automobiles" because they are the salesmen dedicated to the servicing portion of the dealership's business. Pet.Br.23-24. Service advisors diagnose customers' service needs, provide information about optional services, and ensure that customers are satisfied with the services provided. As Respondents' complaint makes clear, service advisors are integral to a dealership's servicing of vehicles. J.A.40-41. In short, service advisors are "primarily engaged in ... servicing automobiles" by selling the servicing of automobiles. Service advisors are certainly not primarily engaged in any activity *other than* selling or servicing automobiles, nor are they primarily engaged in selling or servicing anything other than automobiles.

1. Respondents and DOL nonetheless argue that there is ambiguity as to whether service advisors are engaged in servicing automobiles, but those arguments fail.

First, Respondents attempt to circumvent the statutory language "primarily engaged in ... servicing automobiles" by pretending it does not exist. Respondents repeatedly ignore the phrase "primarily engaged in" and casually suggest that the statute exempts only salespeople "*who sell* automobiles" or partsmen and mechanics "*who service* automobiles."

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[1] The AFL-CIO weakly suggests that service advisors may not be salesmen, *see* AFL-CIO.Br.4, 15-16, but Respondents' complaint states otherwise, J.A.40-41.

Resp.Br.8-10, 15-16, 27 DOL does the same in its regulation, exempting only "salesmen *who sell* vehicles and partsmen and mechanics *who service* vehicles." 76 Fed. Reg. 18,832, 18,838 (2011) (emphasis added); *accord* U.S.Br.24.

But Congress did not enact those formulations. Instead, Congress exempted "any salesman ... *primarily engaged in* selling or servicing automobiles." The phrase "engaged in"—as well as the expansive words "any" and "or"—clearly indicates an intent to broaden the category of exempt employees beyond just those who are under the hood performing service on automobiles. *Compare* 29 U.S.C. §203(j) (defining "[p]roduced" as "produced, manufactured, mined, handled, or in any other manner worked on"), *with id.* (defining "*engaged in* the production of goods" more broadly, as "employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or *in any closely related process or occupation directly essential to the production thereof*" (emphasis added)).

Congress could have easily enacted the language that Respondents and DOL wish had been enacted. Indeed, as Respondents note, Congress has routinely used the terms "servicing" or "perform service" (as opposed to "engaged in servicing"). For example, 42 U.S.C. §7671h(c) requires any "person repairing or servicing motor vehicles" to obtain a certification. *See also* 2 U.S.C. §2025(b). None of those other statutes uses the broader phrase "engaged in ... servicing," nor do they appear to reach partsmen. These differences in statutory language make clear that Congress knows how to use the word "servicing" and elected a broader

meaning by using "engaged in servicing" in §213(b)(10)(A).

For similar reasons, Respondents' reliance on a Google Books search of the phrase "salesmen servicing" is utterly irrelevant. Resp.Br.20. Even if Google Books were a sound interpretive guide, this particular search is unavailing. No one suggests that service advisors primarily do something other than sell. Indeed, it is because they sell that they are among the "any salesman" covered by §213(b)(10)(A). And it is because they sell the servicing of automobiles that they are salesmen *primarily engaged in* servicing automobiles. Certainly, nothing in Google Books or any other source suggests that there is anything anomalous about salespeople selling services rather than things (like automobiles).[2] And, as with so many aspects of Respondents' argument, their Google-search argument fails to account for the statute's undoubted coverage of partsmen. The Google Books database contains exactly one (irrelevant) hit for "partsman servicing," but that hardly suggests that partsmen are non-exempt.

2. The Ninth Circuit attempted to inject ambiguity into the text of §213(b)(10)(A) by offering a construction in which "engaged in servicing" applies only to employees who "personally" service automobiles. Pet.App.12-13. Respondents now

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[2] Our Google Books search yielded 29,500 results for "selling services," and a search for "salesman selling services dealerships" did not turn up a null set, but, *inter alia*, the explanation that "[t]he service department is tasked with selling the labor time of all the mechanics in the department." Steven Shaw, *Cheating the Dealer* 16 (2011).

distance themselves from that holding, asserting that DOL's regulation never used the word "personally" and that the Ninth Circuit used that term only "in passing." Resp.Br.18. Although Respondents (correctly) decline to defend a "personally service" requirement, they nonetheless offer a number of other interpretations of "engaged in ... servicing" that do the same thing *sub silentio* and are every bit as narrow and atextual as the Ninth Circuit's approach.

For example, Respondents contend that "Congress used the term 'servicing' ... to refer to the activity of employees who maintain or repair automobiles." *Id.* But that does not advance the ball. Even if servicing involves maintaining and repairing, the question remains whether an employee must maintain or repair the vehicles "personally" or "directly." And it is clear that Congress did not intend such a narrow requirement, both because it omitted such adverbs and included partsmen, who do not themselves "perform[] maintenance or repairs" on automobiles. *Id.* For similar reasons, Respondents badly miss the mark when they assert that "[e]ven if a salesman sells automobile services performed by a mechanic, the salesman is not the one who is 'servicing' the automobiles." Resp.Br.29. Once again, the same could be said for partsmen: "Even if a [partsman supplies parts for] automobile services performed by a mechanic, the [partsman] is not the one who is 'servicing' the automobiles." In reality, Congress did not include any requirement that salesmen or partsmen themselves be the ones who do the servicing.

It is enough that they are "primarily engaged in ... servicing automobiles." Pet.Br.29-31.[3]

3. Perhaps recognizing that the Ninth Circuit's legal theory would write partsmen out of the statute, Respondents attempt to redefine "servicing" in a convoluted effort to capture partsmen but exclude service advisors. Resp.Br.32-40. Respondents resort to a scattershot listing of potential characteristics that *might* distinguish *some* partsmen from service advisors. For example, they argue that some partsmen "*may*" have "grease under their fingernails," get their "hands dirty," wear no tie to work, or "work in the back" of a dealership. Resp.Br.11, 34-35.

There are several obvious problems with Respondents' attempt to redefine "servicing" in this manner. First, not one of Respondents' proffered tests has any basis in the statute. Nothing in §213(b)(10)(A)'s text suggests that Congress even remotely cared about the amount of grease on a partsman or salesman's fingers, or the fact that a service advisor, but not a partsman, may wear a tie. Nor is there any indication that Congress intended to exempt employees based on whether they "work in the back" or as a mechanic's "right-hand" person. Congress demonstrated no intent whatsoever to divvy

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[3] DOL similarly asserts that service advisors are not exempt because "they sell the servicing performed by others." U.S.Br.11. But emphasizing that the servicing is performed by others is just another way of saying that service advisors do not personally do the servicing. The same is true of partsmen: "they [requisition, stock, and dispense parts for] the servicing performed by others." *Id.*; 29 C.F.R. §779.372(c)(2).

up "servicing" based on such extra-textual considerations.

Second, Respondents' effort is flatly contrary to DOL's own regulations. Those regulations define "partsman" expansively as an employee "primarily engaged in requisitioning, stocking, and dispensing parts." 29 C.F.R. §779.372(c)(2). The government selectively paraphrases this regulation as encompassing an employee who "involve[s] himself in repairing or providing maintenance for automobiles by working with a mechanic and 'dispensing parts.'" U.S.Br.22-23. But a partsman who only "requisition[s]" and "stock[s]" parts is equally exempt and materially indistinguishable from a service advisor: both are unquestionably *engaged in* the servicing of automobiles even though neither is under the hood performing the service.

Indeed, even the government concedes that a partsman is engaged in servicing even if he "does not personally install the parts" because partsmen perform a "key task[] in repairing the vehicle." U.S.Br.23. But, once again, the same can be said of service advisors, who also perform "key tasks" in servicing the vehicle.[4] Borrowing from the government's apt explanation, "[a] mechanic, of course, might be able to [ascertain customer needs and get customer approval] to complete a repair without the real-time assistance of a [service advisor] by his side. But that merely reinforces the conclusion that a

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[4] Respondents feign ignorance about what it means for a task to be "integral" to the servicing process, Resp.Br.1, 19, but DOL apparently has no such difficulty in light of its nearly identical reference to "key tasks" in the service process.

[service advisor] is involved in repairing or providing maintenance because he performs key tasks in repairing the vehicle. Dividing those tasks between two individuals reflects that both the mechanic and the [service advisor] are logically understood as involved in repairing ('servicing') the vehicle." *Id.*

* * *

In sum, neither Respondents nor the Ninth Circuit nor DOL has been able to articulate any coherent interpretation of §213(b)(10)(A) under which partsmen are engaged in servicing automobiles but service advisors are not. That failure is hardly surprising. Congress drafted the exemption broadly to encompass *any* salesman, partsman, or mechanic primarily engaged in servicing automobiles, and that expansive statutory text plainly encompasses *both* service advisors and partsmen. No canon of construction permits interpreting the concept of "servicing" broadly for partsmen and narrowly for salesmen. *See FCC v. AT&T*, 562 U.S. 397, 408 (2011).

C. The Legislative History Sheds No Light on the Exemption's Scope.

The Ninth Circuit concluded that "[n]on-textual indicators of congressional intent, such as legislative history, are inconclusive," and for good reason. Pet.App.15. While Respondents and the government invoke floor statements, unrelated exemptions, statements by non-legislators, and even post-enactment legislative "history," they can point to no legislative history directly addressing whether *service advisors* are within or without the exemption. Respondents' and the government's efforts to use "ambiguous legislative history to muddy clear

statutory language," *Milner v. Dep't of Navy*, 562 U.S. 562, 572 (2011), are the kinds of arguments that give legislative history a bad name.

For example, Respondents suggest that because Congress "focused" on farm-implement partsmen when passing the exemption, it intended to exempt partsmen primarily because they travel offsite and work irregular hours. Resp.Br.36-38. But, while an earlier version of the bill exempted only farm-implement partsmen, the statute Congress eventually enacted exempted *all* partsmen. And Respondents cannot plausibly contend that the exemption only reaches salesmen, partsmen, and mechanics who travel offsite or work irregular hours.

Respondents then draw exactly the wrong inference from the earlier version of the 1966 amendment. As Respondents note, that earlier version separately exempted "partsmen primarily engaged in *selling or servicing* farm implements." H.R. 13,712, 89th Cong. §209(b) (ordered to be printed by Senate, Aug. 26, 1966) (emphasis added); Resp.Br.36. Congress later rolled that exemption into §213(b)(10)(A), which covered automobiles, trailers, trucks, and aircraft, as well as farm implements. The fact that Congress had initially exempted partsmen "engaged in *selling or servicing* farm implements" confirms that Congress intended the disjunctive phrase "selling or servicing" to be interpreted broadly and for the gerunds "selling" and "servicing" to apply to *each* noun, even to the relatively rare partsman engaged in selling, and not servicing, farm implements. There are far more service advisors (*i.e.*, salesmen engaged in selling services) than

partsmen engaged in selling farm implements and no more reason to exclude the former than the latter, who were undeniably covered by §213(b)(10)(A)'s predecessor.

Respondents next argue that Congress intended to exempt only car salesmen, and not other types of salesmen, because some Members of Congress discussed only car salesmen in floor statements. Resp.Br.3, 16; U.S.Br.25-26. But this Court is wary enough about drawing inferences from the *absence* of statutory text. *See, e.g., Burns v. United States*, 501 U.S. 129, 136 (1991). Drawing inferences from gaps in the legislative history when the text is broad and clear plainly takes matters too far. "An inference drawn from congressional silence certainly cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent." *Id.*

Not to be outdone, DOL offers even less reliable evidence of *congressional* intent—statements from *non-members of Congress*. U.S.Br.25. Those statements (from a witness at a subcommittee hearing) shed no light on what Congress actually intended or enacted. Plumbing the depths of witness statements when the Members (and even their staff) are silent is truly "an exercise in 'looking over a crowd and picking out your friends.'" *Exxon Mobil v. Allapattah Servs.*, 545 U.S. 546, 568 (2005).

Respondents and DOL complete the exercise by invoking *post-enactment* legislative history to draw inferences about the enacting Congress' intent. This so-called history, better characterized as "legislative future," *United States v. SCS Bus. Inst.*, 173 F.3d 870, 878-79 (D.C. Cir. 1999) (Silberman, J.), is a

remarkably poor indicator of congressional intent *at the time Congress acted*. "Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation." *Bruesewitz v. Wyeth*, 562 U.S. 223, 242 (2011).

The cited post-enactment "history" confirms why such materials are devoid of interpretive value. Respondents assert that the *1974* FLSA amendments—which did not amend any of the relevant language in §213(b)(10)(A)—show that, *in 1966*, Congress intended to exempt salesmen engaged in selling automobiles, but not salesmen engaged in servicing automobiles. Resp.Br.30-31. The 1974 amendment narrowed the exemption for trailer, boat, and aircraft dealerships (not automobile dealerships) to "any salesman primarily engaged in selling" those vehicles. Pub. L. No. 93-259, §14, 88 Stat. 55, 65 (1974).

Respondents and the government speculate that by removing the words "partsman" and "mechanic" and the phrase "or servicing" for trailer, boat, and aircraft dealerships in 1974, Congress intended to apply only "selling" to "salesman" in the *1966* exemption for *car dealerships*. That theory "sounds absurd, because it is." *Sekhar v. United States*, 133 S. Ct. 2720, 2727 (2013). Even if the 1974 amendment were somehow relevant, it is equally consistent with a congressional intent to make non-exempt *any employee* engaged in servicing at trailer, boat, and aircraft dealerships—whether they were partsmen, mechanics, or service advisors. Indeed, there would be no better way for Congress to have made all those primarily engaged in servicing, including service

advisors, non-exempt than by making those changes. That Congress made no comparable changes to §213(b)(10)(A) strongly indicates that all three remain exempt.

D. FLSA Exemptions Should Not Be Interpreted Narrowly.

Respondents also double down on "that last redoubt of losing causes," *OWCP v. Newport News Shipbuilding*, 514 U.S. 122, 135 (1995)—the anti-employer canon that the FLSA's exemptions should be construed "narrowly." Resp.Br.40-43.[5]

Respondents defend the Ninth Circuit's reliance on that canon based on Congress' expectations when it enacted the exemption. But the far more reasonable way to assess congressional expectations is to look at the text that Congress enacted. Indeed, the whole purpose of §213(b)(10)(A) was to ensure that the FLSA *did not* apply to certain employees whose job duties and compensation structure made them a poor fit with the FLSA's inflexible regime of mandatory overtime compensation. It thus makes no sense to construe that exemption (or any other FLSA exemption) narrowly. Like any other statute, an FLSA exemption should be construed neither narrowly nor broadly, but fairly and correctly. Pet.Br.34-35; Chamber.Br.5-15.

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[5] Strangely, the government denies that the Ninth Circuit relied on the anti-employer canon, U.S.Br.26-29, even though the court invoked the canon repeatedly, Pet.App.6, 8, 11.

II. DOL's Interpretation Is Unreasonable Even If The Exemption Is Ambiguous.

A. DOL's Regulatory Interpretation and Respondents' Newly Offered Definitions of "Servicing" Are Entitled to No Deference.

DOL's interpretive regulations deserve no deference under *Chevron* because they are neither "reasonable," *Chevron v. NRDC*, 467 U.S. 837, 843-44 (1984), nor deserving of deference in light of DOL's unjustified flip-flop-flip. DOL had it right when it acquiesced in the uniform views of the courts interpreting §213(b)(10)(A). Its unexplained un-acquiescence, involving less reasoning than its initially-rejected position, cannot carry the day. Moreover, all of the arguments for why the exemption's text is unambiguous apply with equal, if not greater, force in explaining why DOL's interpretation is objectively unreasonable.

DOL provides no satisfactory explanation for its artificial narrowing of the textual exemption. Respondents and DOL concede that salesmen are people who sell. Yet they attempt to unduly restrict the exemption to cover only salesmen who sell *cars*, not those who sell the servicing of cars. Because the statute covers "any salesman," the only question is whether salespeople who sell services are "engaged in servicing," even though they do not directly perform the service. The answer to that question is found in Congress' inclusion of partsmen, who are engaged in servicing and are plainly exempt, even though they do not directly perform service on automobiles. Pet.Br.28-31; *supra* pp.12-16. DOL's unreasonable

narrowing of the definition of "salesman" warrants no deference.

This Court likewise cannot defer to the many novel arguments that Respondents raise for the first time, such as their gerrymandered definitions of "servicing." Those arguments are unpersuasive on their own terms and cannot support a deference argument because they run afoul of "the foundational principle of administrative law" that courts may not consider arguments not embraced by the agency in its rulemaking. *Michigan v. EPA*, 135 S. Ct. 2699, 2710 (2015). DOL's regulation must rise or fall based on the agency's own reasoning, not arguments first advanced by a private party in an appellate court.[6]

B. Treating Service Advisors as Exempt Is Consistent With the FLSA's Structure and Broader Purposes.

Treating service advisors as non-exempt also makes little sense in the context of the broader statutory scheme. The FLSA contains many provisions that exclude salespeople and commissioned employees from the mandatory-overtime rules. *See* 29 U.S.C. §§207(*i*), 213(a)(1). Those provisions reflect the basic reality that salespeople such as service advisors are often far removed from the FLSA's original purposes and ill-suited to the FLSA's regulatory regime.

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[6] Respondents also advance the indefensible proposition that the statute unambiguously renders service advisors *non-exempt*. Resp.Br.2, 13. That position was a bridge too far even for the Ninth Circuit and DOL, neither of which has ever suggested that service advisors are *unambiguously* non-exempt. Pet.App.6; U.S.Br.14.

Respondents argue that Petitioner is seeking to create an "implied exemption" in §213(b)(10)(A) based on the FLSA's other express exemptions. Resp.Br.53-55; *accord* Professors.Br.4-7, 10-13. But that attacks a strawman. Petitioner cited the FLSA's other exemptions for salespeople and commissioned employees because they demonstrate that the exemption for dealership salesmen in §213(b)(10)(A) is motivated by Congress' understanding that salespeople are "more concerned with their total work product than with the hours performed." *Brennan v. Deel Motors*, 475 F.2d 1095, 1097 (5th Cir. 1973). That is certainly true of Respondents, who are paid commissions.[7] Forcing dealerships to pay overtime to service advisors under the one-size-fits-all FLSA regime is a misguided attempt to fit a square peg into a round hole because salespeople are "hardly the kind of employees that the FLSA was intended to protect." *Christopher v. SmithKline Beecham*, 132 S. Ct. 2156, 2173 (2012).

Finding service advisors non-exempt would also create unwarranted divisions among dealerships' core employees. Respondents and their *amici* contend that there are no concerns about creating divisions within a dealership's salesforce because a number of other salespeople at dealerships are not exempt under

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[7] Respondents suggest that Petitioner seeks to exempt service advisors because they are paid commissions. Resp.Br.52-53; *accord* Professors.Br.10-13. Not so. Service advisors are compensated in various ways, Pet.Br.13 n.4, and eligibility for the §213(b)(10)(A) exemption does not turn on the method of compensation.

§213(b)(10)(A). Resp.Br.15-16; AFL-CIO.Br.18-32.[8] But those salesmen fall outside the exemption because they are not "engaged in selling or servicing automobiles." Congress has decided to exempt all core employees (salesmen, partsmen, and mechanics) engaged in two core dealership functions (selling and servicing). Denying an exemption under §213(b)(10)(A) for a subset of those core dealership employees engaged in servicing would inevitably be disruptive and divisive and contravene Congress' clearly expressed intent. Moreover, to the extent service advisors share characteristics of both their fellow exempt salespeople and their fellow exempt servicing employees, it makes no sense to make service advisors alone non-exempt. Respondents are primarily engaged in selling and servicing and are not primarily engaged in anything else. The notion that they somehow fall between the cracks created by DOL is mystifying, and has mystified every court to consider the question, save the Ninth Circuit below.

Respondents' concerns about re-enacting the 1961 blanket exemption for all dealership employees are pure hyperbole. Resp.Br.9. The blanket exemption covered *everyone* employed by a dealership, including typically non-exempt employees (*e.g.*, porters, janitors). Pub. L. No. 87-30, §9, 75 Stat. 65, 73 (1961). Those employees—who are not salesmen, partsmen,

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[8] The AFL-CIO focuses exclusively on decisions of the Labor Board rather than the FLSA. AFL-CIO.Br.2. That brief's laundry list of non-exempt employees in servicing departments (at 18-32) is entirely irrelevant to service advisors' exempt status because none of the non-exempt employees is a "salesman, partsman, or mechanic."

or mechanics—will remain non-exempt no matter how the Court decides this case.

C. DOL Has Failed to Adequately Justify Its Adoption of an Interpretation That Upsets Long-Settled Expectations.

The Ninth Circuit's decision upends an area of law that had been settled for over 30 years. Affirming the decision below would have significant negative consequences for the nation's 18,000 car dealerships employing 45,000 service advisors. NADA.Br.11-14. Those dealerships and their service advisors have operated under mutually beneficial compensation plans in good-faith reliance on decades of precedent holding that such employees are exempt and decades of DOL acquiescence in those decisions. Pet.Br.40-45. Those compensation plans were in full effect when DOL changed its long-standing interpretive position in 2011.

If allowed to stand, the Ninth Circuit's decision would require a wholesale and wholly unwarranted restructuring of how those employees are compensated, with no ability for service advisors who prefer the *status quo ante* to opt out. This Court should reject plaintiffs' attempts to impose significant liability on employers who have done nothing more than pay workers in conformity with long-settled industry practice. *See Christopher*, 132 S. Ct. 2156.

Finally, even if some service advisors might potentially be covered by different, less specific, and more burdensome FLSA provisions, *see* Resp.Br.53-55; U.S.Br.34-35, that is no reason to adopt an unduly narrow interpretation of §213(b)(10)(A). Indeed, to the extent service advisors share characteristics that

make employees exempt generally, that is just one more reason that it is nonsensical to deny them the specific exemption Congress gave to all salesmen, partsmen, and mechanics primarily engaged in the servicing of automobiles.

CONCLUSION

Service advisors are unambiguously exempt because they are engaged in servicing automobiles by *selling the servicing*. That is the only interpretation that gives meaning to the statute's expansive language, disjunctive phrasing, and exemption of partsmen, who are engaged in servicing even though they do not perform service under the hood. This Court should make clear that the statute means what it says and reject Respondents' and DOL's misguided efforts to upend long-standing compensation practices. The judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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